UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

MONDELĒZ GLOBAL LLC,	:	
Respondent,	:	
and	:	**Case Nos. 22-CA-174272, 22-CA-178370, 22-CA-178591, 22-CA-179007, 22-CA-180206, 22-CA-180213, 22-CA-181423, and 22-CA-183609**
BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 719, AFL-CIO,	:	
Charging Party.	:	

POST-HEARING BRIEF OF RESPONDENT

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Consistent with Section 102.42 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent Mondelēz Global LLC ("Respondent" or "Company") respectfully submits this Post-Hearing Brief. This matter is a consolidated case concerning eleven (11) separate allegations in eight (8) unfair labor practice charges that Respondent violated the National Labor Relations Act (the "Act" or "NLRA"). *See generally*, Consol. Am. Compl. ¶¶ 1-41.

The Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 719 ("Local 719" or "the Union") filed ten (10) unfair labor practice charges involving over thirty-two (32) separate allegations of alleged wrongdoing by Respondent. The vast majority of these allegations were withdrawn or dismissed by the Board before this trial. During the trial, the General Counsel dismissed two (2) additional allegations, Paragraphs 28(c) and 28(g) of the Consolidated Amended Complaint. (Tr. pp. 10:1-12; 661:4-9[1]). The remaining allegations consist of three (3) employee discharges; one (1) employee suspension; four (4) alleged unilateral changes – not laying off by seniority by retaining trainees, insisting on a joint orientation for new hires, adjusting the shift times for the B&R Processors, and attempting to clarify notification requirements for returning from Short-Term Disability leave before next scheduled shift; two (2) alleged failures to respond to requests for information; and one (1) alleged failure to deduct union dues. The remaining alleged unfair labor practices at issue in these cases uniformly demonstrate that Respondent acted consistently with its obligations under the Act. This case is a clear example of the Union attempting to misuse the Board's processes[2] to improperly pressure Respondent following the expiration of the national collective bargaining

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1 References to the Transcript will be denoted with "Tr.," followed by a page and line reference. Exhibits introduced by the General Counsel will be denoted with "GX", exhibits introduced by the Charging Party will be denoted with "CX", and exhibits introduced by Respondent will be denoted with "RX."

2 Throughout this case, it has been clear that the Union, not the General Counsel, was the chief prosecutor and making the strategy decisions to further its goal of putting improper pressure on Respondent.

agreement in February 2016. As a result, the Consolidated Amended Complaint should be dismissed in its entirety, and no violations of the Act should be found.

I. DISCHARGE ALLEGATIONS

In the Consolidated Amended Complaint, the General Counsel alleges that Respondent violated Sections 8(a)(1) and 8(a)(3) by discharging Nafis Vlashi ("Mr. Vlashi"), Bruce Scherer ("Mr. Scherer"), and Claudio Gutierrez ("Mr. Gutierrez") (collectively "alleged Discriminatees") because of their status as shop stewards.

Contrary to the General Counsel's assertions, Respondent discharged the alleged Discriminatees for falsifying company records, leaving the work area without authorization, excessive breaks, and/or using the time badge of another employee or permitting another employee to use their time badge. After conducting a thorough analysis of the facility's high overtime expense to determine what was driving these overtime costs, the analysis ultimately revealed that the alleged Discriminatees, among others, had discrepancies between their time on premises and time remunerated. Upon further investigation, it was determined that the alleged Discriminatees had engaged in major violations of the Company's rules. As a result, Respondent properly discharged them. Their status with the Union did not motivate these discharge decisions, as evidenced by Respondent's discharge of other, non-shop steward employees at the same time. Accordingly, these allegations are wholly without merit in law or fact, and thus should be dismissed in their entirety.

A. Factual Background

Respondent operates a bakery and warehouse facility in Fair Lawn, New Jersey. The facility produces Ritz crackers, Oreo cookies, and other products. The baking, packing, warehouse, environmental, maintenance and repair, distribution, and garage employees working at the facility, excluding supervisors, are represented by the Charging Party, Local 719. (Tr. pp.

46:16-47:5). Respondent's predecessor in interest, Kraft Foods Global, Inc., and Local 719 were parties to a collective bargaining agreement, effective February 29, 2012 through February 29, 2016 ("CBA"). (GX-3). The CBA expired and, despite good faith negotiations by Respondent, a successor agreement has not yet been reached. (Tr. p. 52:16-17).

Under the CBA, Respondent retains the full power to discipline employees:

> The full power of discharge and discipline lies with the Company. It is agreed that this power shall be exercised with justice and with regard for the reasonable rights of the employee. . . .

(*See* GX-3; Article 34). Further, pursuant to Article 40 – Miscellaneous of the CBA, Respondent maintains the right to determine the appropriate disciplinary actions for violations of its rules and policies:

> The Company reserves the absolute right to determine the level of discipline and the seriousness of each incident. This will apply for all employees in the Bakery, Distribution Center, and the Sales Branches.
>
> By entering into this agreement, the Company does not waive its right to determine and/or implement appropriate disciplinary actions for violations or [sic] company policies, rules and regulations.

(*Id.*, Art. 40).

1. Respondent's Analysis of Overtime Expenses.

In September 2015, Rogelio Melgar ("Mr. Melgar") was brought to the Fair Lawn facility by Respondent as its new Continuous Improvement Engineer. (Tr. pp. 803:21-804:1). He had most recently been employed by Respondent in Australia. (Tr. p. 804:10-17). As the Continuous Improvement Engineer, he was responsible for overseeing the performance of the line and maximizing output and cost per pound, trying to figure out ways to streamline the processes, and put systems in place for proper functioning of equipment and economic factors. (Tr. pp. 804:22-805:4). The biggest cost factor for a facility is labor costs, and overtime can be a

large part of that. (Tr. pp. 805:21-806:1). Mr. Melgar noted that the Fair Lawn facility's overtime cost was 36-37%, when he would have expected, based on other facilities, for it to be in the single digits. (Tr. p. 806:4-6).

To analyze the overtime issue, Mr. Melgar reviewed payroll data from the LIS, Respondent's payroll system. (Tr. p. 806:7-18). He was alarmed at the number of employees recording over 80 (and even over 100) hours per week. This was a concern both from a safety and output/performance perspective. (Tr. p. 807:2-12). As a result, Mr. Melgar raised this issue with the Plant Manager, Charlotta Kuralti, who asked him to look into the issue further. (Tr. p. 807:13-15).

Mr. Melgar's next step was to go in "deeper" to understand overtime drivers. (Tr. pp. 808:18-809:1). He created a database of payroll records from LIS and turnstile records, and supplemented this information with visual evidence from Respondent's security system. This was the first time such a database of information existed for the facility to analyze overtime in this manner. (Tr. pp. 809:5-19; 828:22-829:1).

In his initial review of the information, Mr. Melgar found a high correlation between the number of manual punches and overtime. As a result, the decision was made to centralize manual punches with one authorized person in the facility in December 2015 to see if this might reduce the amount of overtime expense at the facility. (Tr. pp. 809:20-810:16). Unfortunately, there was no real change in overtime after this manual punch change by the end of first quarter of 2016. (Tr. pp. 810:21-811:2).

As a result, Mr. Melgar went back and analyzed his database further and prepared a Report in May 2016. (GX-19; Tr. p. 811:10-16). In preparing the Report, Mr. Melgar selected 16 random weeks from October 2015 to May 2016 (Tr. p. 815:6-13), and filtered for everyone

with more than 80 hours per week in any of those weeks. He also checked how many times these same employees were going in and out of facility per day; verified no manual punches for these 59 employees; and analyzed any discrepancies between turnstile and payroll records. (Tr. pp. 811:25-814:2; 909:17-24). Mr. Melgar also did his own check to confirm that the security turnstiles were working properly. (Tr. p. 915:2-12). Mr. Melgar reviewed video that is retained for one month and any video that he captured previously. (Tr. p. 979:1-20). He reviewed available video for all 59 employees in his study. (Tr. p. 980:3-22). He reviewed video of certain days, not targeting any employees. At times, such as in December 2015, he was watching the video to try to explain the overtime pattern; he tried to review video for particularly high days of overtime to determine what happened that day and who were the employees with high overtime. (Tr. pp. 983:23-984:11; 988:21-24). If he noticed only outs and no ins, he reviewed data to understand why. He would review schedules of the persons involved, position, payroll records, turnstile records, and video; also, he would check with the labor scheduler to understand the functions of the persons involved. (Tr. pp. 984:12-986:20). Mr. Melgar did not choose to do or not do something as part of his review based on who the employee was or what position they held. (Tr. p. 957:21-23). The Report shows all employees for whom Mr. Melgar found evidence of intent to circumvent the system. (Tr. p. 980:3-22; 817:21-24).

Mr. Vlashi was one of the 59 employees studied because, of the 16 randomly selected weeks, he had seven (7) weeks of more than 80 hours, with some over 100 hours consecutively. (Tr. p. 859:16-22). Mr. Melgar determined that, on September 28, 2015, Mr. Vlashi's records showed an exit and entry within a very short period; out at 3:09:30 p.m.; in 7 seconds later; and then another in at 5:42 p.m. – this is one of the patterns that Mr. Melgar was trying to understand in his investigation. He determined that Mr. Vlashi was using the turnstile to pretend he was in

the building, when he was really out of the building for almost 4 hours. (Tr. pp. 826:8-828:15; 829:21-25). On September 29, 2015, Mr. Vlashi's records showed an out at 9:50:51, an in at 9:50:55, and another in 55 minutes later; then an out at 4:51 p.m., an in 3 seconds later, followed by another in 48 minutes later; Mr. Vlashi did the same again at 7:40 p.m. with 70 minutes out of the building. As a result, Mr. Vlashi had a total time out of the building of 173 minutes that day. (Tr. pp. 829:2-19; 830:1-5). On November 18, 2015, Mr. Melgar saw that Mr. Vlashi had the same pattern of out, very quick in, and then a later in – which showed Mr. Vlashi leaving the building for another extended period. (Tr. p. 830:6-16). This incident was captured on video and showed Mr. Vlashi on his phone, leaving with a quick in swipe with his other hand, as if he was coming in. (Tr. p. 835:17-25). The video evidence shown at the hearing showed exactly what Mr. Melgar had described. (Tr. p. 836:14-16). The turnstiles were changed and updated to a new version in late November, early December 2015. (Tr. p. 845:1-4).

Mr. Melgar also found issues with respect to Mr. Vlashi in May 2016. On May 5, 2016, the records reflect that Mr. Vlashi left the building at 9:22 p.m., but remained on the pay system through 11:30 p.m. (Tr. pp. 843:22-844:13). On May 6, 2016, the records established that Mr. Vlashi came in at 7:25 p.m., went out at 10:04:02 p.m., came in at 11:17 p.m.; and then out at 11:30:31 p.m. (Tr. pp. 845:9-846:13), so that he was out of the building for 73 minutes on premium time. (Tr. p. 847:3-6). On May 12, 2016, Mr. Vlashi was out of the building from 12:34 p.m. to 1:27 p.m. and from 6:53 p.m. to 11:11 p.m., while on the clock, for a total of 5 hours; returning at the end of his shift to simply clock out. (Tr. pp. 850:14-851:8). On May 21, 2016, while being paid for Saturday work at overtime rates, Mr. Vlashi was unaccounted for outside of the building from 6:19 p.m. to 8:55 p.m. (Tr. pp. 851:22-852:9). Finally, on May 22, 2016, which is Sunday double-time, Mr. Vlashi was unaccounted for out of the building from

2:31 p.m. to 6:06 p.m. (Tr. p. 852:10-17). Mr. Melgar reviewed video for entire periods to confirm that Mr. Vlashi did not enter through the turnstiles during the periods he was suspected of being out of the facility. (Tr. p. 964:10-17).

Mr. Melgar also reviewed records concerning Zoran Naumoski, who had the highest turnstile ratio in his Report. (GX-19). Mr. Melgar wanted to understand the reasoning behind that ratio. His review showed Mr. Naumoski having 95 minutes out of the building on October 13, 2015, without including transit time, and 59 minutes out of the building on October 14, 2015. (Tr. pp. 853:15855:-21). Mr. Naumoski was no longer an employee of Respondent by the time the Report was completed. (Tr. p. 856:10-15).

Mr. Scherer also was one of the 59 employees studied with over 80 hours in a week. In his situation, on May 5 and 6, 2016, consecutive outs by Mr. Scherer caught Mr. Melgar's attention. In reviewing video for those days, Mr. Scherer was shown deliberately bypassing the security turnstile to enter the building; he did not use his card at 7:45 p.m., which evidenced an intent to hide how long he was outside of the building; Mr. Melgar noted that Mr. Scherer had over four (4) hours of unaccounted time, 2:57 p.m. to 7:11 p.m., during the week he recorded over 80 hours of working time. (Tr. pp. 856:19-859:11). Mr. Melgar reviewed the entire period of the video evidence to try to determine when Mr. Scherer left. (Tr. pp. 918:1-919:2). Mr. Melgar's review of the video and records showed that Mr. Scherer deliberately bypassed the security turnstile, under circumstances evidencing his intent to hide being out of the facility. (Tr. p. 943:15-22).

Mr. Koroskosky also was studied because he had four (4) of the 16 randomly selected weeks with over 80 hours on the clock. (Tr. p. 860:5-8). Mr. Melgar noted that Mr. Koroskosky did not have a record of departure on May 6, 2016. (Tr. p. 817:24-25). While trying to

understand why there was no record (Tr. p. 819:1-2), Mr. Melgar reviewed the video surveillance to determine how Mr. Koroskosky departed the building around the time of his clocking out at 11:30 p.m. on the pay system. (Tr. pp. 819:19-820:3). During this process, Security Captain Louis stopped the video and identified Mr. Koroskosky as the person the system was recording as Mr. Gutierrez. (Tr. p. 820:4-10). Mr. Koroskosky could be seen in a screen shot photo of the video while Mr. Gutierrez's card was being logged by the turnstile record. (Tr. p. 821:8-10). There was no video of Mr. Gutierrez exiting the building that night. (Tr. p. 822:5-18). In studying the records further, Mr. Melgar determined that Mr. Koroskosky swiped out on the timeclock at 11:30:02 p.m., and Mr. Gutierrez at 11:30:04 p.m. – 2 seconds later at the same terminal. (Tr. pp. 822:19-823:1; 823:21-824:8). The payroll system showed that both were being paid for performing overtime at that time. (Tr. p. 824:19-21). Mr. Melgar had noted a pattern of two consecutive ins and no outs on the turnstile records, so he was trying to understand how these employees were exiting the building. (Tr. p. 825:2-8). Mr. Melgar concluded that Mr. Koroskosky used Mr. Gutierrez's card to punch out in payroll system, and the security turnstile then picked up Mr. Gutierrez's card that Mr. Koroskosky had on him when exiting the security turnstile. (Tr. p. 825:18-25). This discrepancy, with Mr. Koroskosky in the video at the time the security turnstile registered Mr. Gutierrez, is the only reason Mr. Gutierrez is in Mr. Melgar's Report. (Tr. p. 826:1-5).

After completing the Report, Mr. Melgar provided it to Charlotta Kuratli and the Human Resources Manager,[3] and had a discussion to explain the Report. (Tr. p. 860:9-18). He was not asked to supplement or modify the Report in any way. (Tr. pp. 860:19-861:1). Mr. Melgar was

[3] The Human Resources Manager is no longer employed by Respondent and has active litigation against the Respondent, which is why she was not called by Respondent as a witness. (Tr. pp. 1188:14-1189:2).

not involved in the disciplinary decisions of any of the individuals identified in his Report in any way. (Tr. p. 861:6-8).

At approximately the same time as he completed his Report, Mr. Melgar was advised that another employee, John Manevski, who was not one of the 59 employees covered by Mr. Melgar's initial Report, was caught leaving the building for extended periods of time, and the Human Resources Manager requested that Mr. Melgar verify whether this was an isolated incident. (Tr. p. 861:18-24). As a result, Mr. Melgar reviewed the information at his disposal and prepared a supplemental report on Mr. Manevski. (RX-11; Tr. p. 862:14-21). Mr. Melgar determined that Mr. Manevski was out of the building on June 11, 2016 (Saturday) for 199 minutes; on June 4, 2016 (Saturday) for 281 minutes; on May 7, 2016 (Saturday) for 187 minutes; on May 25, 2016 (Monday) for 4.7 hours; on February 20, 2016 for 4.24 hours; and on February 19, 2016 for 180 minutes. (Tr. pp. 863:3-864:18). As with the individuals identified in the initial Report, Mr. Melgar was not involved with any disciplinary decision for Mr. Manevski (Tr. p. 866:3-8) and was not asked to modify the separate report completed for Mr. Manevski. (Tr. p. 866:9-12).

Mr. Melgar was also asked to look into the records of another employee, Christian Barreto (Tr. p. 866:13-21), who also was not one of the 59 employees identified in Mr. Melgar's original Report. (Tr. p. 867:22-24). In addition to not being one of the 59 employees with high overtime, Mr. Melgar determined that, unlike the others, while there were a number of ins and outs, Mr. Barreto was signing the log book when exiting the building, thereby acknowledging his absence outside of the building, which Mr. Melgar verified with video evidence. (Tr. p. 868:4-18). Mr. Melgar determined that every time Mr. Barreto exited the building, he signed the book. Mr. Melgar did not find any evidence of Mr. Barreto exiting the building without acknowledging

his absence from the building. (Tr. pp. 869:9-19; 886:4-17; 887:1). Mr. Melgar found no intent by Mr. Barreto to abuse Respondent's process, as supported by video evidence and he never saw Mr. Barreto bypass the turnstiles on the video. (Tr. p. 887:4-21). Mr. Melgar reported his findings about Mr. Barreto and was not asked to modify or supplement his report. (CX-20; Tr. pp. 871:5-872:3). Mr. Melgar was not involved in any discipline decision regarding Mr. Barreto. (Tr. p. 872:4-10).

In summary, Mr. Melgar's initial investigation revealed:

- Mr. Vlashi had eight (8) verifiable violations of the Company's rules during the random 16-week period – September 28, 2015; September 29, 2015; November 18, 2015; May 5, 2016; May 6, 2016; May 12, 2016; May 21, 2016; and May 22, 2016.
- Mr. Scherer had two verifiable violations of the Company's rules during the random 16-week period – May 5 and 6, 2016.
- Mr. Koroskoski had two verifiable violations of the Company's rules during the random 16-week period – October 15, 2016 and May 6, 2016.
- Mr. Gutierrez had one verifiable violation of the Company's rules during the random 16-week period – May 6, 2016.

These violations are supported by turnstile records, time records, and video/photo evidence. Mr. Melgar's follow up investigations found multiple violations by Mr. Manevski, but no evidence of intent to evade Respondent's process with respect to Mr. Barreto.

Mr. Melgar was not aware of the shop steward or union officer status of Mr. Vlashi, Mr. Gutierrez, Mr. Koroskoski, Mr. Scherer, Mr. Naumoski, Mr. Manevski, or Mr. Barreto; and any such status did not impact whether they were covered by his Report. (Tr. p. 872:11-25). Mr. Melgar made no other findings for specific individuals outside of the Report, except for Mr. Barreto and Mr. Manevski. (Tr. p. 899:14-22).

2. Employee Interviews and Employment Actions

Pamela DiStefano, Respondent's Director of Labor Relations for North America Region (Tr. p. 1160:7-9), testified that it was brought to her attention that there were irregularities with a number of employees' time and attendance records. (Tr. p. 1163:8-10). She received and reviewed the Report. (GX-19; Tr. p. 1163:11-24). The Report was explained to Ms. DiStefano in meetings with the Human Resources Manager, Mr. Rogelio, Michael Keenan from Corporate Security, and Ms. Kuratli. Based on that review and explanation, Ms. DiStefano understood that Respondent's records indicated falsification of time records by several individuals and that the employees were determined to be outside of the building when they were supposed to be working. (Tr. pp. 1163:25-1164:18). The methodology for the Report was also reviewed. (Tr. p. 1191:6-8). At around the same time, Ms. DiStefano received and reviewed the supplemental report concerning Mr. Maneveski (RX-11) and she and the Human Resources Manager, Mr. Rogelio, Mr. Keenan, and Ms. Kuratli went through same process with that report. (Tr. p. 1165:3-12).

Ms. DiStefano directed the Human Resources Manager to interview individuals as part of an investigation to find out their explanations, if any, for the discrepancies. (Tr. p. 1165:13-19). She then reviewed and discussed the interview outlines with Mr. Keenan and the Human Resources Manager (Tr. pp. 1165:20-1166:2), and ensured that the proper questions were being asked. (Tr. p. 1203:9-15).

The employee interviews were conducted by the Human Resources Manager and Michael Keenan, who had been hired by Respondent in January 2016 as Regional Business and Integrity Officer and Security Director for North America. (Tr. p. 1000:5-10). Mr. Keenan oversees compliance investigations for Respondent (Tr. p. 1000:19-20), and was notified of a possible time theft issue at Fair Lawn facility (Tr. p. 1001:10-17). Mr. Keenan was provided the Report

(GX-19; Tr. p. 1003:18-23); reviewed the Report and then had a discussion with the Human Resources Manager to understand what was represented in the Report – time record swipes and security turnstile swipes, along with video coverage, showing four employees being paid when not in the building. (Tr. pp. 1004:24-1005:12). Mr. Keenan also received and reviewed the supplemental Manevski report (RX-11), and had the same discussion with the Human Resources Manager to understand the information presented. (Tr. pp. 1005:18-1006:11).

Mr. Keenan participated in the interviews of Mr. Vlashi, Mr. Scherer, Mr. Gutierrez, and Mr. Manevski, with the Human Resources Manager and a union representative. The individuals were interviewed based on the questions that had been prepared and notes were taken by the Human Resources Manager. (Tr. pp. 1006:16-1007:18). Mr. Keenan identified RX-12 as the interview questionnaire that was used for questioning during the interviews, along with the handwritten notes of the witnesses' responses and testified that the notes accurately describe the responses provided by the interviewees. He also received a typewritten summary of the interviewees' responses, which accurately summarizes what was discussed in the interviews. (CX-20 at pp. 34-35; Tr. pp. 1008:20-1009:24; 1010:7-19). Page 14 of CX-20 contains the introduction that was read to each interviewee at the beginning of each interview. (Tr. pp. 1011:21-1012:5).

Prior to the interviews, the decision was made that there was the "possibility" of suspending the employees, but that information refuting the findings would be considered before doing so. (Tr. p. 1022:7-17). Each alleged Discriminatee, Mr. Koroskoski, and Mr. Manevski were suspended at the end of their interview. (Tr. p. 1010:20-22). It was Mr. Keenan's opinion, based on the Report and interviews, that these employees were out of the building for periods of time when they were supposed to be working, and yet they were being paid, which is theft of

time. (Tr. pp. 1012:23-1013:8). Mr. Keenan knew that all of the employees were in the bargaining unit, but he did not know their status or place with the Union, if any. (Tr. p. 1013:13-19).

The alleged Discriminatees admitted the following from the interviews:

- Mr. Valshi admits that, during the suspension meeting, he was asked to explain what happened on the various dates and that he could not offer any explanation, as he couldn't remember. (Tr. pp. 424:24-427:6; 428:13-15). He further admits that he did not raise union business as a reason during his suspension meeting. (Tr. pp. 520:1-3; 520:13-16).

- Mr. Scherrer testified that, during his suspension meeting, he admitted to going around the turnstiles – claiming it "wasn't a big event." (Tr. p. 603:6-10). He also claimed that it was impossible for him to leave the building because he was on the production line; that it was impossible for him to take a 2-hour break and he never did; and that the union business excuse never came up. (Tr. pp. 622:19-623:12).

- Mr. Gutierrez admits that he was told he was being investigated for "falsifying records" and "stealing time from the company." (Tr. p. 684:19-21). He was asked, and he denied, anybody punching his time card (Tr. p. 685:23-25), even though "I knew somebody used my card to get in and out. Yes, I did." (Tr. p. 687:10-11). Mr. Gutierrez testified that, during the suspension meeting, he was asked about May 6, 2016 (Tr. p. 723:19-20) and somebody using his card at the security turnstiles to exit (Tr. p. 724: 8-22). His testimony on the issue was incredibly self-contradictory, but in the end he admits that he was asked for an explanation of someone else having his card at the security turnstiles that evening and that he denied doing so. (Tr. pp. 725:2-6; 728:23-729:8; 729:18-20). He testified that he was asked whether he knew how Mr. Koroskoski had his card; he admits denying any knowledge, unless Mr. Koroskoski took it from his wallet; he admits telling the Company that Mr. Koroskoski does not make it a habit of taking the card from his wallet, unless he is a good thief; he admits telling the Company that he did not think that Mr. Koroskoski used his card; he admits telling the Company that he did not leave the building that day after 3:24 p.m.; and he admits that he claimed to be there entire time and wished he could go home and get paid. (Tr. pp. 740:19-741:21; 742:14-19).

The General Counsel also called Christian Barreto to testify. Again, he testified consistently with the Company's witnesses as to why, after his interview, he was only suspended and not discharged. He explained that he had anxiety and was smoking a lot, which accounts for most of his time outside the building (Tr. p. 763:5-7); that he never left the company property for

his smoke breaks (Tr. p. 773:22-25); and that he did not intend to avoid or jump the turnstiles. (Tr. p. 774:5-8). He explained that he had lost his wallet one day outside, told his supervisor, and went out to find it; but there was no security guard at that time, so he went around the security turnstile. (Tr. p. 763:8-18). In the meeting with the Company to investigate, he told the Human Resources Manager about his supervisor "Jerry" authorizing him to find his wallet, smoking outside, and having finished his cleaning job for the day. (Tr. p. 767:10-21). As a result, he was not immediately suspended as the others had been, but the Company let him go back to work and he was told that the Company would investigate further and get back to him. (Tr. p. 767:10-18). Mr. Barreto testified that it was his belief that the Company then spoke with his supervisor, and cleared up his time card issues; but the Company gave him a 3-day suspension for jumping the turnstile. (Tr. pp. 767:24-768:4; 775:23-25).

After the interviews were completed, Ms. DiStefano reviewed the notes from the interviews (RX-12; Tr. p. 1167:8-19), and discussed the explanations or lack thereof from the alleged Discriminatees and other implicated employees, the appropriate level of discipline, and any additional things to think about based on their explanations. (Tr. p. 1168:2-12). Her recommendation was that some of the individuals, including the alleged Discriminatees, Mr. Koroskoski, and Mr. Manevski, would be discharged based on the apparent intentionality and deliberate nature of their acts, and one employee, Mr. Barreto, would be suspended. (Tr. p. 1169:10-13). No action could be taken as to Zoran Naumoski, as he had already left the Company by that time. (Tr. p. 1169:17-24).

Ms. DiStefano agreed with the reasons for the discharge of Mr. Scherer, Mr. Gutierrez, Mr. Vlashi, Mr. Koroskoski, and Mr. Manevski, as set forth in their July 1, 2016 discharge letters. (CX-7; CX-8; CX-9; RX-14; Tr. pp. 1171:16-1174:20). She also agreed that, based on

the investigation and interviews, Mr. Barreto was in a different situation from the others because of his signing the book and the determination that there was no intent to falsify, to deceive, or to steal time; that he openly left the building and signed in and out from the building to smoke; and, therefore, he was only suspended. (Tr. pp. 1169:25-1171:2; 1171:3-6).

While Ms. DiStefano had knowledge that Mr. Vlashi had a position with the Union and was involved with the CBA negotiations, she had no knowledge of any of the others being shop stewards with the Union. (Tr. p. 1175:5-17). Ms. DiStefano was clear that Mr. Vlashi's position with the Union did not factor into the Company's discharge decision. (Tr. p. 1175:18-21).

B. Legal Standard

The Board has long recognized that in considering 8(a)(3) allegations of discrimination, it applies the analytical framework set out in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that (a) the employee was engaged in protected activity; (b) the Company had knowledge of that activity; (c) the Company harbored animus against the activity; and (d) there is a causal link between the adverse action taken and the Company's alleged animus toward the protected activity. If, and only if, the General Counsel establishes a *prima facie* case, the burden shifts to the Company to establish that it was motivated by legitimate objectives. *Wright Line*, *supra.* If the Company articulates a legitimate business reason for the alleged conduct, the burden shifts back to the General Counsel to prove that the Company's proffered business justifications are a pretext for discrimination.

C. Argument

1. The General Counsel Did Not Establish a *Prima Facie* Case Under *Wright Line.*

No *prima facie* case exists. While the Company will concede that the alleged Discriminatees engaged in union activity and that some but not all of the decision makers had knowledge of that Union activity,[4] there is no evidence for the third or fourth elements of the *prima facie* case. There is no substantial, admissible evidence of anti-union animus (only conjecture and suspicion) and there is no causal link between that non-existent animus and the Company's decision to terminate them.

a. *The General Counsel Failed to Establish Substantial Anti-Union Animus.*

With respect to the anti-union animus element of the *prima facie* case, the Board requires that evidence of anti-union animus must be substantial. In *Raysel-Ide, Inc.*, 284 NLRB 879, 880 (1987), the Board noted that proof of animus must be "strong enough to support a conclusion that the Respondent was willing to violate the law by discriminating against employees, in order to keep the union out." *See also*, *Obars Mach. & Tool*, 322 NLRB 275 (1996) (Board affirming dismissal of 8(a)(3) allegation where there was no credible evidence of substantial union animus); *Fibrocan Corp.*, 259 NLRB 161, 171-172 (1981).

The General Counsel first tries to imply that simply taking disciplinary action against shop stewards somehow shows anti-union animus. This fails for the simple reason that non-shop steward employees—Mr. Koroskoski and Mr. Maneveski—were discharged at the same time for the same offenses. Mr. Vlashi also testified that there were 14 Union board members and 26 shop stewards (of whom 3 were also board members). (Tr. pp. 470:7-12; 472:4-9). As a result,

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[4] Again, Mr. Melgar, who conducted the investigation, had no knowledge of any of their Union activity (Tr. p. 872:11-25), Mr. Keenan who participated in the interviews and decision making had no such knowledge (Tr. p. 1013:13-19), and Ms. DiStefano only knew that Mr. Vlashi was involved with the Union (Tr. p. 1175:5-17).

there were a total of 37 union officials and shop stewards. (Tr. p. 474:11-19). No disciplinary actions were taken against 34 of the 37 union officials and shop stewards. This is hardly a substantial showing of anti-Union animus. According to Mr. Vlashi, the "strong" shop stewards were him, Mr. Gutierrez, Mr. Nazzaro, Mr. Scherrer, Joe Bush, and Randy Rocco. (Tr. p. 546:12-15). There is no allegation of any action being taken with respect to Mr. Bush or Mr. Rocco or, more importantly, of them having been found to have violated any of the Company's disciplinary policies. The Board has recognized that evidence of an employer's "nondiscriminatory treatment of [known union supporters]" may be considered to show an employer's "lack of animus toward union activity" and is entirely appropriate to show the "General Counsel's failure to meet his initial burden [under *Wright Line*]." *National Security Technologies, LLC*, 356 NLRB No. 183, slip op. at n. 1 (2011). The Board and administrative law judges routinely consider evidence that an employer did not discipline other known union supporters as probative of whether union animus likely motivated the employer's decisions with respect to the particular employees at issue. *See e.g. La Mousee, Inc.*, 259 NLRB 37, 47 (1981) (finding no 8(a)(3) violation, the ALJ pondered, "[w]hy then, was [the union supporter at issue] terminated and [another union organizer] not? The answer lies in [the first union supporter's] conduct...the threats she made toward [a manager]."); *Bay Control Servs., Inc.*, 315 NLRB 30, 44 (1994) (finding no 8(a)(3) violation, the Board observed, "that [the company] had hired at least one union journeyman. . . . Therefore, union membership considerations do not appear to exist."); *Old Tucson Corp.,* 269 NLRB 492, 498 (1984) (finding no 8(a)(3) violation where "[t]here were, after all, numerous other employees who from the tally of ballots were also known to have voted for the Union [who were not disciplined]"); *L.B. Darling Div. of Idle Wild Farm, Inc.*, 254 NLRB 691, 694 (1981) ("Here I do not think that the credible evidence warrants the

inference that [the employee at issue] was discharged for his union activity. There is, for example, no showing of animus or hostility toward the union. [A manager's] testimony shows that management was aware of the union activity, and of several named employees who were involved in it [but not disciplined]."); *Master Housekeepers*, 287 NLRB 908, 909 (1987) (finding no 8(a)(3) violation for refusal to hire seven of prior owner's employees because employer knew that all 59 of prior owner's employees were union members but still hired 28 of them); *LM Waste Service Corp.*, 357 NLRB No. 194 (2011) (finding no 8(a)(3) violation the Board stated, "[w]e note particularly...that the Respondent discharged Cardona approximately 2 months after union activity commenced at the facility and *without concurrently discharging other employees*...") (emphasis added).

Moreover, mere status as a shop steward, without more, does not support a finding of discriminatory discharge under section 8(a)(3). *See, e.g.*, *Mead Corp.*, 275 NLRB 323, 324 (1985) (no violation of section 8(a)(3) where steward was suspended for insubordination and no evidence of anti-union animus); *Hydra-Tool Co.*, 222 NLRB 1113, 1121 (1976) ("When [employee] became shop steward [he] was not thereby relieved of the normal requirements of discipline and productivity applicable to other employees"); *Electro Controls, Inc.*, 161 NLRB 307, 320-22 (1966) (finding no violation of section 8(a)(3) where shop steward was discharged for repeatedly leaving his work area without permission). Indeed, the alleged Discriminatees admit that despite their being vocal union supporters, no one from the Company ever said anything to them about their union activity. (*See, e.g.* Tr. p. 737:13-15).

The General Counsel's other attempts to show anti-union animus similarly fail. The mere fact that the Union was engaging in conduct to attempt to pressure Respondent in bargaining and that Respondent resisted such pressure does not establish anti-union animus. Thus, the testimony

about the fact that, on February 23, 2016, many bargaining unit employees wore union t-shirts throughout the bakery (Tr. p. 108:15-17) or that there were Union rallies, on April 25 or 26, 2016, with 70 people protesting on the facility's front lawn (Tr. p. 110:7-10; Tr. p. 111:224-25), does nothing to show that the Company harbored substantial anti-union animus. As Leon Koroskoski and Mark Sickles testified, they also participated in union rallies, picketing, and wore the union t-shirt (Tr. pp. 367:6-16; 383:12-20) and nothing happened to them. Similarly, the Union's attempt to hang two Union propaganda flags saying "United We Stand" within Respondent's facility, and the Company asking them to remove the flags, also does not evidence any anti-union animus. (Tr. pp. 678:18-679:4; 679:12-16; 702:8-12). Respondent's opposition to the Union's organizational efforts is not unlawful and cannot be used as a basis for finding animus. *See* 29 U.S.C. § 158(c); *see also Winkle Bus Co., Inc.*, 347 NLRB 1203, 1208 (2006), *NLRB v. Lampi,* 240 F.3d 931, 936 (11th Cir. 2001). A finding of animus simply cannot be based on an employer's exercise of its Section 8 rights.

Mr. Vlashi also testified about the Company continuing to listen to and respond favorably to Union grievances and concerns. He testified about an issue with the Stevens Cleaning Group cleaning line 6 (Ritz) when they were not lock out/tag out qualified. (Tr. p. 409:11-13). He testified that he raised the issue with a supervisor, who agreed with Mr. Vlashi and sent the contractors home. (Tr. p. 411:7-11). He testified about two (2) occasions where supervisors allegedly made comments about how there is "no contract," to "do as I say," and "you have to do what I say, you have no contract" in March and April 2016. After he complained about those comments (which happen to have been both factually and legally correct), the supervisors at issue apologized and never said it again. (Tr. pp. 413:14-415:1). Moreover, another "old timer supervisor" said he would speak with management and make sure no one else says it and that

"After that day, we never heard it again." (Tr. p. 415:2-12). Similarly, Mr. Vlashi testified about a situation with the Company issuing an employee a 10-day suspension for not having a badge to clock in and out and that, after he filed a grievance, the Company rescinded the suspension, as the Union requested. (Tr. pp. 416:17-418:25). Again, none of this shows anti-union animus, instead it shows the opposite.

Finally, the Union tries to concoct alleged anti-union animus from the other ULP charges that have been improperly consolidated with this case. None of those allegations have merit (as discussed below) and even if they could, these alleged violations do not show substantial anti-union animus. They are each minor claims that the evidence shows were not long lasting or substantial:

- As for the allegation about not laying off by seniority by retaining trainees, the testimony showed that the Company's conduct in retaining the newly hired trainees was in keeping with prior similar situations and the layoff was only for one week.

- The issue about the joint orientation for new hires only brought the parties into compliance with the collective bargaining agreement and did not interfere with any substantial right of the Union or any employee.

- The temporary adjustment of the shift times for the B&R Processors was based on a reasonable interpretation of the CBA and was reversed after the Union protested the change.

- As for the attempt to clarify the notification requirements for returning from Short-Term Disability leave before an employee's next scheduled shift, again, after further discussions with the Union, the Company continued to allow people to return to work from STD leave promptly. This was not even a change, but simply an attempt to clarify the language of the old policy, which made no sense for individuals returning from an STD leave who had no next scheduled shift.

- The two (2) alleged failures to respond to requests for information were both temporary in nature, as the Union either had or received all of the requested information, and an outright refusal to provide the information would have been permissible under the law, as the Union's requests indisputably were improper attempts to obtain discovery in support of pending ULP charges.

- Lastly, the alleged failure to deduct union dues also was temporary in nature and insubstantial, as these types of administrative errors were common in the history of the dealings between the parties, and even the requirement to continue to deduct dues is subject to legitimate legal debate.

None of these alleged ticky-tack violations show any anti-union animus. Rather, the Union's filing of the multitude of ULPs, with their 32 separate alleged violations, shows that the Union has been attempting to gin up pressure on the Company to support its bargaining demands,[5] not that the Company has any anti-union animus, let alone substantial animus. Consequently, there is no evidence on the record of any anti-union animus by the Company in this case, much less the substantial anti-union animus required to support an 8(a)(3) charge.

b. ***The General Counsel Failed to Establish a Causal Connection.***

The General Counsel failed to establish any causal connection between the alleged anti-union animus and the decision to discharge the alleged Discriminatees. Respondent's decision to terminate the alleged Discriminatees' employment was not causally linked to any anti-union animus. Respondent took the exact same action at the same time against two employees found to have engaged in the same conduct who had no history of Union activity - Mr. Koroskoski and Mr. Manevski.[6] Further, Respondent would have discharged Zoran Naumoski, who also was not involved with the Union, for his conduct had he not already been separated from the Company for other reasons.

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[5] The Board has expressly stated "there is a meaningful distinction between direct economic warfare between parties to labor disputes and the subversion of the Board's processes by one party for the objective of inflicting economic injury on the other." *Toering Electric Company*, 351 NLRB 225, 231 (2007).

[6] The General Counsel's failure to call either Mr. Koroskoski and Mr. Manevski to testify about the circumstances of their discharges, despite clearly having access to them, allows a presumption that their testimony would have shown that there was no disparate treatment and no causal connection between any alleged anti-union animus and the discharges of the alleged Discriminatees. *See Int'l Automated Machs., Inc.*, 285 NLRB 1122, 1123 (1987) (citing 2 Wigmore, Evidence § 286 (2d ed.1940); McCormick, Evidence § 272 (3d ed.1984)) ("[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.")

Moreover, the overtime analysis that ultimately resulted in the alleged Discriminatees' (as well as the other employees') discharges had begun in the Fall of 2015, after Mr. Melgar arrived at the facility, for the legitimate reason of trying to figure out the very high percentage of overtime at the facility. There is no evidence to even suspect that it was causally related to any Union activity in the Spring of 2016.

As a result, the General Counsel has failed to establish even a *prima facie* case of unlawful discrimination, as there is no evidence of substantial anti-union animus and no causal connection with the discharges of the alleged Discriminatees. Consequently, the Discharge allegations of the Consolidated Amended Complaint should be dismissed.

2. Respondent Established Its Strong Legitimate, Nondiscriminatory Reasons for the Discharges.

Even assuming the General Counsel had established a *prima facie* case, which it has not, the Respondent established a strong legitimate, nondiscriminatory reason for the alleged Discriminatees' discharges. The alleged Discriminatees' misconduct, which stripping away the labels amounted to criminal theft of time, caused the Company to discharge them. Such misconduct constitutes legitimate and nondiscriminatory reasons for the discharges. *See, e.g.*, *Syracuse Scenery & Stage Lighting Co., Inc.*, 342 NLRB 672, 673-74 (2004) (dismissing 8(a)(3) claims where employees "left work without permission, submitted inaccurate timesheets—*i.e.* falsified records to secure payments for hours they did not work—and lied about the matter to the [employer]"); *Children's Mercy Hospital*, 311 NLRB 204, 205-06 (1993) (employee's falsification of company records regarding work performed constituted legitimate justification for his termination); *United States Postal Service*, 310 NLRB 530, 535-36 (1993) (receiving pay under false pretenses constituted legitimate reason for chief steward's termination). It is well-settled that "the Act is not a shield protecting employees from their own misconduct or

insubordination." *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977); *Electro Controls, Inc.*, 161 NLRB at 317 ("It is too well-established to require extended discussion or citation of authorities, that mere union membership, or other protected concerted activities . . . will not insulate an employee against discharge for just cause or legitimate reasons"). *Alpers' Jobbing Co.*, 231 NLRB 449, 450 (1977) ("an employee's union activity does not insulate him from discharge for engaging in conduct for which he would have been terminated even if he had not been a union proponent."); *Decaturville Sportswear Co.*, 205 NLRB 824, 831 (1973) ("[i]t is well settled that prominent union activity or adherence does not grant employees any special immunity from discipline for misconduct or failure to do their work properly.").

Each alleged Discriminatee admits that falsification of company records, leaving the work area without authorization, and using the badge of another employee or allowing your badge to be used by another employee all subject an employee to discipline (Tr. pp. 480:14-24; 608:21-609:13; 709:3-710:10), and that the Company has right to determine the level of discipline depending on the circumstances of the violation (Tr. pp. 481:6-11; 482:4-21; 651:7-9; 705:17-21; 706:10-707:3). They also agree that, when clocked in, they are expected to be performing work for the Company. (Tr. pp. 610:4-7; 711:22-25).

More importantly, Mr. Scherer and Mr. Gutierrez admitted their misconduct:

- Mr. Scherer admitted that he jumped the security turnstile. (Tr. pp. 617:19-618:7; 603:6-10).
- Mr. Gutierrez admitted all of the allegations against him and, making matter worse, admitted that he lied to the Company during its investigation. (Tr. pp. 684:19-21; 685:23-25; 687:10-11; 689:16-691:2; 692:2-9; 691:20-24).

Further, even though Mr. Vlashi continues to deny his misconduct, his denials are simply not credible. Mr. Vlashi denied that he left the building on the occasions identified by Mr. Melgar, despite the mountain of evidence to contradict his denials. (RX-12). His union business excuse,

which was raised for the first time well after his discharge (Tr. pp. 520:1-3; 520:13-16), does not stand up to any level of scrutiny, as many of the dates and times of his violations are not when he would have been engaged in union business. For example, May 21 and 22, 2016 were a Saturday and a Sunday, when there is no union business. (Tr. pp. 399:1-2; 513:1-4; 513:15-21; 851:22-852:9; 852:10-17; 1113:21-1114:10).[7] Similarly, Mr. Vlashi's claims that Elainy Borrero was his supervisor when he was doing union business (Tr. p. 396, lines 16-18) or that he was allowed to leave the building during his shifts was directly contradicted by Ms. Borrero. (Tr. pp. 1113:6-10; 1114:17-18; 1115:5-8; 1115:23-25).[8]

Whether the General Counsel agrees with Respondent's decision-making process is irrelevant. *See L'Eggs Prod., Inc. v. N.L.R.B.*, 619 F.2d 1337 (9th Cir. 1980) ("An employer may discharge an employee for good cause, bad cause, or no cause at all, without violating 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act... It follows that the Board has the burden of proving that a discharge was motivated by antiunion animus"); *Framan Mech., Inc.*, 343 NLRB 408, 412 (2004) (holding that employer lawfully discharged employees during a union organizing campaign, even though employer was aware that the alleged discriminatees were involved in the campaign, noting that it

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[7] Under applicable NLRB precedent, "[a] credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole." *Bates Paving & Sealing, Inc. & Juan Gaxiola, an Individual*, 2015 L.R.R.M. 186426 (N.L.R.B. Div. of Judges July 20, 2015). Furthermore, inconsistencies in testimony can serve to undermine the reliability of a witness' account. *See Case Farms Processing, Inc. & United Food & Commercial Workers, Local No. 880*, 2011 WL 4350210 (N.L.R.B. Div. of Judges Sept. 16, 2011) (testimony not sufficiently reliable to support findings of unfair labor practices where there was inconsistencies in witness' testimony).

[8] Mr. Vlashi is not a credible witness. He was shown to have made false statements in his NLRB Affidavit dated July 26, 2016, which states, under penalty of perjury: "I was not disciplined before June 15, 2016". (Tr. pp. 488:21-489:2; 489:16-20). As he did with respect to the time theft issue, he made an implausible excuse saying that he signed the Board affidavit under emotional distress. (Tr. p. 489:24). He later admitted that he made an incorrect statement (Tr. p. 490:3-10), as he was being confronted with RX- 9, which is his prior discipline for performance and attendance (Tr. p. 490:24-491:2). This shows that his sworn testimony here also cannot be credited as he has already shown he has no issue with making false sworn statements to the Board. (Tr. p. 496:15-18).

is "well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful."). The Board has made clear that engaging in protected activities is not "a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." *Anheuser-Busch, Inc.*, 351 NLRB 644, 647-648 (2007) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947)). *See also Classic Truck Rental Corp.*, 251 NLRB 443, at fn. 1 (1980) (lawful suspension of alleged discriminatee where the Board found the employee's "misconduct, particularly his 'stealing time,' provided sufficient cause for disciplinary action up to and including discharge."). Consequently, Respondent has established strong, legitimate, non-discriminatory reasons for the discharges.

3. The General Counsel Did Not Prove that Respondent's Legitimate, Nondiscriminatory Reasons for the Discharges Were a Pretext for Unlawful Discrimination.

Finally, the General Counsel did not show that Respondent's actions were mere pretext for unlawful discrimination against any of the alleged Discriminatees. There is no evidence to show that Respondent terminated any of the alleged Discriminatees for any reason other than the legitimate, nondiscriminatory reasons discussed above. The General Counsel failed to prove unlawful discrimination against each of the alleged Discriminatees based on their individual circumstances, including their testimony. Therefore, the allegations contained in the Consolidated Amended Complaint concerning the alleged Discriminatees should be dismissed.

Notably, where "the General Counsel makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial." *Bally's Park Place v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011); *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 5 (2014). "Of course," conversely, and of relevance here, "'the weaker a *prima facie* case against an employer under *Wright Line*, the easier for an employer to meet his burden . . . of proving [the

employer's action] would have occurred regardless of protected activity.'" *Sasol N. Am. Inc. v. NLRB*, 275 F.3d 1106, 1113 (D.C. Cir. 2002) (court's bracketing and ellipses, *quoting Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 582 (9th Cir. 1982)). The General Counsel has, at best, a weak *prima facie* case, and Respondent has met its easier burden to show that it would have discharged the alleged Discriminatees regardless of the protected activity, as it did with Mr. Koroskoski and Mr. Manevski and would have done with Mr. Naumoski, who did not engage in any protected activity.

The General Counsel has argued that Respondent's discharge decisions were "based on a flawed and incomplete investigation." (Tr. p. 16:20-21). This is meaningless. The Act "does not require that an employer act wisely, or even reasonably; only, whether reasonable or unreasonable, that it not act discriminatorily." *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976). *See also McKesson Drug Co.*, 337 NLRB 935, 937 n.7 (2002) (an employer need only show "that it had a reasonable belief that the employee committed the offense, and that it acted on that belief"). In making its determination, the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline. *See, e.g., Nat'l Express Corp.*, 341 NLRB 501, 502 (2004). There is no evidence to show that Ms. DiStefano, Mr. Keenan, Ms. Kuralti, and the Human Resources Manager believed that the Report was flawed or incomplete or did not establish that the alleged Discriminatees and other implicated employees violated the Company's policies repeatedly.

The Union tried hard to poke holes in the Report. Spending a long cross examination of Mr. Melgar looking at bits and pieces of the information he reviewed in his eight to nine month study, the Union tried to establish that Mr. Melgar missed other potential violations, citing as examples issues with Jory Stith, John Moody, Kathy Moore, and Rosanna Bianco. (*See,*

generally, Tr. p. 888-978). With all of these alleged examples, there was no ability for Mr. Melgar to go back and recreate the review of all of the different information he had reviewed in preparing the Report, such as the video, schedules, log books, etc. In the end, however, it was clear that Mr. Melgar had not found evidence of intent by Jory Stith, John Moody, Kathy Moore, or Rosanna Bianco to circumvent the system (Tr. p. 980:3-22), as he had with alleged Discriminatees. Moreover, Mr. Melgar did not know the union shop steward or officer status of Jory Stith, John Moody, Kathy Moore, or Rosanna Bianco. (Tr. pp. 980:23-982:14). As a result, all of these attempts do not come anywhere close to establishing that the decision reached by Respondent based on the Report and the findings from the interviews were a pretext for unlawful discrimination. *See, Libertyville Toyota*, 360 NLRB at 1302 (Board finds that employer met its *Wright Line* burden when evidence showed that it fired employee—towards whom it had animus—for losing his license where comparator evidence was too vague to show inconsistent treatment of other employees); *J.K. Guardian Serv., Inc.*, 327 NLRB 614 (1999) (employer reason for action must be rebutted by proof that the reason advanced did not exist or in fact was not relied upon).

This case is very similar to *Simplex Grinnell*, Case No. 01–CA–169310 (ALJ Decision dated February 14, 2017). In that case, the ALJ dismissed the ULP complaint over discharges for time theft after trial, where General Counsel's argument was that "the Employer, having found discrepancies in [the alleged discriminatees'] records, and having confronted them and established to a near certitude that they engaged in fraud, did not search through the records of all other employees searching for discrepancies. This is unconvincing." The ALJ went on to note:

> [T]he General Counsel offers no convincing evidence that others engaged in "theft of time." The General Counsel's method of trying to show this at trial

> involved rifling through cold GPS and timesheet records of other employees and questioning [the Company witness] about potential discrepancies suggested by the General Counsel. This was not compelling. In the first place, it amounted to a game of blind man's bluff. Neither the General Counsel nor [the Company witness], nor any witness was familiar with any of the incidents focused on by the General Counsel. None of the employees at issue were called by the General Counsel to explain what their records showed. [The Company witness], although being asked to speculate on the spot, based on no investigation, no discussion with the people involved, and never having reviewed these incidents, was—sometimes but not always—able to propose an explanation of why a discrepancy claimed by the General Counsel did not trigger a suspicion in his mind of time fraud. And it is notable that the General Counsel's perusal of the records unearthed only a smattering of claimed discrepancies (GC Br. at pp. 23–26) involving three employees out of what must have been thousands of service calls. This documentary review is far too uncertain to constitute solid evidence of disparate treatment toward [alleged discriminatees], or even of other examples of time fraud.

Id. The same is true here. The Union tries to point to a smattering of issues it allegedly found in over 30,000 rows of data (Tr. p. 975:10-11) concerning 59 employees over 16 different weeks, that no one would be able to show were or were not even issues.[9] There simply was no proof of disparate treatment based on anti-union animus offered by the Union or the General Counsel.

Moreover, an employer need not prove that the employee actually committed the theft of time. *Chinese Daily News,* 346 NLRB 906, 908 (2006) (affirming ALJ's finding that employer did not violate Section 8(a)(3) by discharging employee based on to its reasonable belief that employee was stealing company property). Rather, an employer satisfies its burden where it demonstrates its decision to terminate the employee's employment was "based on a good-faith belief that [the employee] had engaged in theft of the [Company's] property." *Id.* at 946; *see*

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[9] It is anticipated that the Union may attempt to attach an unauthenticated and irrelevant alleged analysis of the spreadsheet that was part of Respondent's analysis of the overtime issue that some unnamed employee of the Union's counsel put together as part of its Post-Hearing Brief. The inclusion or consideration of any records that were not admitted at the trial of this matter would be improper. Any such analysis would also be worthless, as it would not be able to recreate the additional analysis that Mr. Melgar testified about, such as reviewing the video and/or the review of the log books to show intent to evade. Moreover, it would not provide any evidence of unlawful discrimination as there is no evidence concerning the alleged union status of any of the other individuals that may be implicated by the Union's analysis. It is also anticipated that this analysis would not show whether the individuals with discrepancies were on overtime or double time rates or were even stealing time.

also Yuker Constr. Co., 355 NLRB 1072, 1072-73 (2001) (General Counsel failed to meet its *Wright Line* burden where employer discharged employees based on a mistaken, honest belief that they violated company policy, even if the termination decision was made "hastily"); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 & n.1 (1999) (employer did not discharge employees in violation of the Act based on its reasonable, good-faith belief that the employees had engaged in terminable misconduct).[10]

Lastly, the General Counsel and Charging Party apparently want to rely upon CX-15 to argue that, in the past, for allegedly similar conduct, the Company did not discharge employees. Their effort, however, fails miserably, as to be relevant, proffered comparators must be "similarly situated employees . . . who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *Aramburu v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). Neither the General Counsel nor the Union did anything to prove that the individuals referenced in CX-15 were "similarly situated" to the alleged Discriminatees. There was no testimony whatsoever concerning the circumstances involved in any of these situations. The only testimony about CX-15 is as follows:

> 18 Q. Mr. Milewski, does the Union maintain records of
> 19 101s in his files in the Union office?
> 20 A. Some, yes.
> 21 Q. Why does it do that?
> 22 A. As a matter of record. You know, certain people
> 23 might have been accused or done a certain thing.

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[10] It is also anticipated that the Union's counsel may try to introduce as part of its Post Hearing Brief copies of purported 207 Reports to try to establish that various employees were actually working when they were shown by turnstile records to be out of the building for extended periods. The inclusion or consideration of any records that were not admitted at the trial of this matter would be improper. Moreover, these documents would show nothing, as Ms. DiStefano testified when one of the employees raised 207s as an explanation, she requested that the 207s be reviewed; it is her understanding that the Human Resources Manager reviewed the 207s; she does not believe that the 207s would cover all of the times a person was out of the building; the 207s themselves can be falsified; and so, she relied on the Human Resources Manager's answer. (Tr. pp. 1210:6-1211:4). As a result, to the extent the 207s indicate that someone was working in the building when the turnstile records and video surveillance show that they left the building, this would likely be more indicative of additional falsification of records by the employees rather than proof of any mistake being made by the Company.

24 And then on that form, there would be an associated
25 discipline given out on it. So, we like to use it
1 as reference, also. You know, investigate numerous
2 stuff by looking at older stuff and where we have
3 been and where -- I don't know if that makes sense.
4 Q. Okay. We will show you what we will mark as
5 Charging Party 15.
6 (Charging Party's Exhibit 15 marked for
7 identification.)
8 BY MR. SHIFFRIN:
9 Q. Mr. Milewski, Charging Party 15 consists of a
10 series of 101. Are these documents found in the
11 Union's files?
12 A. Yes.
13 MR. SHIFFRIN: I will move into evidence
14 Charging Party 15.
15 MR. GAMBURG: No objection.
16 JUDGE CHU: Marked and entered.
17 (Charging Party's Exhibit 15 received into evidence.)
18 MR. SHIFFRIN: Those are all my
19 questions, Your Honor.

(Tr. pp. 138:18-139:19). Similarly, there is no testimony to determine if the employees being disciplined in CX-15 were involved with any union activity or not. *Id.* As a result, CX-15 cannot show any allegedly disparate treatment. The General Counsel similarly introduced GX-14 that also included other disciplinary documents, but provided **no** testimony to establish the circumstances surrounding those various disciplinary actions. (Tr. pp. 270:10-274:17).

Moreover, Respondent established that those prior situations are **not** similar to this case. As Mr. Melgar testified, this was first time that the Company had the detailed type of evidence and the Report to support the discharges. (Tr. pp. 809:5-19; 828:22-829:1). The Company had invested a significant amount of time and energy to study the overtime issue. As a part of that investigation, the very serious issues with the alleged Discriminatees, Mr. Koroskoski, Mr. Manevski, and Mr. Naumoski were uncovered and it took action it was indisputably authorized

to take under the CBA[11] to deal with this first of its kind situation. Simply dumping other unrelated disciplinary documents into the record, with no testimony proving that the situations are substantially similar, is meaningless and does not establish pretext or disparate treatment.

The General Counsel did not establish a *prima facie* case and, even if it did, Respondent established a strong legitimate, non-discriminatory reason for the discharges, which neither the General Counsel nor Union was able to rebut. As a result, the discharge allegations of the Consolidated Amended Complaint should be dismissed.

II. SUSPENSION ALLEGATION

In the Consolidated Amended Complaint, the General Counsel alleges that Respondent violated Sections 8(a)(1) and 8(a)(3) by suspending Richard Nazzaro ("Mr. Nazzaro") for three (3) days on June 13, 2016 because of his union or protected concerted activity or in order to discourage such activity. Contrary to the General Counsel's assertions, Respondent suspended Mr. Nazzaro for his poor work performance related to his continued failure to attend required work meetings. Specifically, all mechanics are required to attend "startup" and "end of shift" meetings at 7:00 a.m. and 2:45 p.m. each day. Mr. Nazzaro has been repeatedly disciplined for his failure to attend these meetings timely or at all. As a result, when Mr. Nazzaro engaged in this misconduct for three (3) consecutive days in June 2016, Respondent issued the next level of progressive discipline – a 3-day suspension. Mr. Nazzaro's status with the Union did not motivate this suspension decision. Accordingly, this allegation is wholly without basis in law or fact, and thus should be dismissed in its entirety.

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[11] The Union and each of the alleged Discriminatees admit that the CBA specifically reserves right to the Company to determine the appropriate level of discipline and that progressive discipline is not required. (*See* GX-3; Article 34, Article 40; Tr. pp. 481:6-11; 482:4-21; 651:7-9; 705:17-21; 706:10-707:3).

A. Factual Background

Donald Kalemba has been employed at the Fair Lawn facility for 18 years as a Maintenance Supervisor and Planner. (Tr. p. 1040:5-9). He testified that the First Shift for the Maintenance Department is 7:00 a.m. to 3:00 p.m. (Tr. p. 1041:11-14) and there is a mandatory start-up meeting at 7:00 a.m. and a mandatory end of shift meeting at 2:45 p.m. All craftsmen are required to attend these meetings. The employees have been informed verbally of the requirement to attend and also a letter was provided with employee paychecks several years ago. (Tr. pp. 1041:17-1042: 4). The purpose of these meetings, in this three shift department, is to communicate information from one shift to the next; review safety; handover issues; and review current issues of importance to the craftsmen, company, or anything related to the department. (Tr. pp. 1042:11-1043:14; 1089:12-1090:18). These meetings last 15 minutes and are on paid time. (Tr. p. 1043:16-21). The mandatory end of shift meeting at 2:45 p.m. is to recap the day, review work assignments, whether completed or not; collect work orders; and discuss outstanding issues that need to be conveyed to the next shift. (Tr. p. 1044:9-17; 1090:16-18). These end of shift meetings have been in place for many years. (Tr. p. 1044:18-22).

Mr. Kalemba was involved in suspending Mr. Nazzaro for his failure to attend the start-up and end of shift meetings, which are also called Daily Management System or DMS meetings. (Tr. pp. 1044:23-1045:6). Mr. Nazzaro has worked the first shift for quite some time. (Tr. p. 1045:21-24). He had previously been counseled and disciplined many times for work rule violations. Indeed, Mr. Nazzaro received a July 11, 2014 counseling (RX-6) for poor performance for failure to begin work in a timely manner. (Tr. pp. 1046:9-1047:17). He also received an August 2014 verbal warning (RX-7) for poor job performance. (Tr. pp. 1047:23-1048:23). Similarly, Mr. Nazzaro received a March 14, 2016 written warning (RX-8) for failure to attend start-up meetings. (Tr. pp. 1048:24-1049:16). RX-13 is evidence concerning an older

incident when Mr. Nazzaro failed to show up for the 7:00 a.m. meeting, which should last approximately 15 minutes, until 7:13 a.m.; when Mr. Kalemba then came back to the room at 7:20 a.m., Mr. Nazzaro was still in the office in the bake shop area drinking coffee, and when Mr. Kalemba asked him to get to work, Mr. Nazzaro responded "Why do [you] have to be an ass first thing in the morning?" (Tr. pp. 1050:22-1051:21).

The 3-day suspension (RX-5) was issued on June 13, 2016 for Mr. Nazzaro's repeated failure to attend end of shift meetings. (Tr. pp. 1054:21-1055:6). Mr. Kalemba noted that Mr. Nazzaro failed to attend meetings on June 8, 9, and 10, 2016. (Tr. p. 1057:5-7). The 3-day suspension was the next step in progressive discipline (Tr. p. 1059:16-20), and was determined by Human Resources (Tr. p. 1060:2-7; 1056:25-1057:4). During the meeting to discuss the suspension, Mr. Nazzaro claimed to be at a labor management meeting on June 9, 2016, but did not notify anyone. All of the employees are advised that they are required to notify a supervisor in advance to let them know that they are not attending the meeting and the reason why. (Tr. p. 1057:12-23). Mr. Nazzaro did not notify a supervisor before missing the hand-off meeting because he was allegedly attending a labor management meeting on June 9, 2016. (Tr. p. 1058:7-9). Mr. Nazzaro provided no explanation for his failure to attend the meetings on June 8 and 10, 2016 (Tr. p. 1058:10-12), and he has never claimed to have been at a labor management meeting on those dates. (Tr. p. 1058:19-21). At the trial, Mr. Nazzaro made internally inconsistent claims about the meetings and claimed to have actually been at two of the three meetings he was being accused of missing; but despite this, he testified that he went to complain to his manager, Ryan Martinez, because he had an alleged agreement with Mr. Martinez that he could miss these meetings to do union business. (Tr. p. 307:9-21). The ALJ, however, called Mr. Nazzaro on this obviously inconsistent and irrational testimony, noting that if he made the

meetings on June 8 and 10, then these dates had nothing to do with any agreement he may or may not have had with Ryan Martinez. (Tr. pp. 309:15-310:5).

Mr. Kalemba was also clear that an employee cannot stand in an adjoining room and participate in the meeting, and that being in an adjoining room would not be considered as being at the meeting. Mr. Kalemba testified that it is clearly visible who is attending the meeting. (Tr. p. 1059:8-15).

Mr. Nazzaro's status with the Union had "absolutely" nothing to do with the suspension decision. (Tr. pp. 1059:24-1060:1). Mr. Joshua Miles, another supervisor in the department, testified that if employees are absent from these meetings, they are counseled; that if it continues, they go through the discipline process; and that Mr. Miles has counseled employees for being late or missing meetings. (Tr. p. 1089:6-11). Mr. Miles noted that, for most employees, once an employee is counseled, he or she changes the behavior. (Tr. p. 1091:5-7). The requirement for all of the employees in the department to attend these meeting is not disputed, as the General Counsel called Mr. Koroskoski to testify and he confirmed that he was informed by Mr. Kalemba that he had to be at the meetings at 7:00 a.m. and 2:45 p.m. (Tr. pp. 367:23-368:3; 368:9-13).

The Union argues that Mr. Kalemba had a grudge against Mr. Nazzaro based on an alleged January 24, 2014 petition brought to Mr. Kalemba's attention by former Human Resources Manager, Laura Shine. (Tr. pp. 1066:21-1067:18; RX-16). Mr. Kalemba testified that Ms. Shine asked Mr. Nazzaro for the original of the petition (RX-16), which Mr. Nazzaro could not produce. In 2014, it appeared to the Company and Mr. Kalemba that Mr. Nazzaro had doctored the petition – that the bottom part was actually the sign-in attendance from a green room meeting the previous week and that Walter Kochman, who is on the petition, said that if his

signature is on it, then it was doctored because he was on vacation the week Mr. Nazzaro tried to present the petition. (Tr. pp. 1081:16-1082:7; 1083:2-23). This behavior (as well as the other relevant testimony) certainly calls Mr. Nazzaro's credibility into question.

Mr. Kalemba clearly testified that he was at the meetings on June 8, 9, and 10, 2016; that there was no chance that Mr. Nazzaro attended and was not noticed; and that neither Mr. Nazzaro nor the Union told Mr. Kalemba that he was at the meetings, but Mr. Kalemba just did not see him. (Tr. p. 1080:3-12). Mr. Miles testified that leading up to the suspension, Mr. Nazzaro was late several times and missed several meetings, which was common for him. (Tr. p. 1091:18-23). Mr. Miles confirmed that Mr. Nazzaro would come in late at 7:05 a.m., 7:10 a.m., etc. quite frequently. (Tr. p. 1092:2-13). He also testified about how it would be very difficult for Mr. Nazzaro to be present and not see him; it is an open space and the supervisors go through the lines and ask what is going on; and Mr. Nazzaro is one to be generally heard during the meetings. (Tr. p. 1093:1-15).

Fred Marshall also testified as to the requirements of the DMS meetings during the time he was Maintenance Manager from June 2012 to June 2014. (Tr. p. 1100:8-12). While he was the Maintenance Manager, he had also had problems getting Mr. Nazzaro to attend the meetings and be on time. He testified about when Mr. Nazzaro arrived late to a start-up meeting in January 2014 and how he had a follow up meeting with Mr. Nazzaro, who claimed he was doing some union business involving a third shift employee; yet, when Mr. Marshall pointed out that there was no third shift that day, Mr. Nazzaro got very agitated (apparently because he was caught in a lie). (Tr. pp. 1103:19-1105:1). Mr. Marshall testified that he told Mr. Nazzaro that he needs to come to the meetings (Tr. pp. 1103:19-1105:1), and, if he cannot, he must inform the supervisor why not (Tr. p. 1105:4-19). Mr. Marshall never gave Mr. Nazzaro permission to

attend the meetings only occasionally; Mr. Marshall wanted everyone at the meetings; if an employee cannot, he must notify the supervisor. (Tr. pp. 1107:3-8; 1108:15-19). This again directly contradicts Mr. Nazzaro's incredible testimony that Mr. Marshall was okay with him making meetings occasionally and if unable, to simply get work orders from his supervisor. (Tr. p. 353:6-13).

B. Legal Standards

The legal standard here is the same *Wright Line* standard discussed above.

C. Argument

For this three (3) day suspension allegation, Respondent will not repeat the arguments above. In summary, the General Counsel failed to prove a *prima facie* case, as again there is no proof of substantial anti-union animus and no causal link between the discipline and the anti-union animus. Even if the General Counsel is found to have proven a *prima facie* case, this allegation still fails, as the General Counsel cannot rebut Respondent's legitimate, nondiscriminatory decision to move to the next step in the progressive discipline process based on Mr. Nazzaro's failure to attend three (3) consecutive end of shift meetings in June 2016.

The General Counsel and Union tried to establish a disparate treatment case by having Mr. Sickles and Mr. Koroskoski testify that they had occasionally missed these meetings and were not disciplined. Yet, missing less than 15 meetings over two years, like Mr. Sickles claims, would not be sufficient enough to warrant any discipline. With that record, speaking with him 2 or 3 times would be correct. (Tr. pp. 1080:22-1081:9). Similarly, being late 3 or 4 times for no more than 5 minutes, and missing 4 other meetings, as claimed by Mr. Koroskoski, would not warrant any discipline. (Tr. pp. 368:14-369:2; 1081:10-15).

As for the recent claim that Mr. Nazzaro was actually present at two of the three meetings, which was not raised before the suspension and is not credible, again, the Act "does

not require that an employer act wisely, or even reasonably; only, whether reasonable or unreasonable, that it not act discriminatorily." *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976). Given Mr. Nazzaro's long history of skipping these meetings and his response during the investigation about being at a labor management meeting on one (1) of these days, it was certainly reasonable for Respondent to believe that he missed all three (3) of the meetings and did not seek approval to do so, as he was required to do for the one (1) meeting he admitted missing because he claimed to be at a labor management meeting. As a result, the General Counsel did not rebut Respondent's legitimate, non-discriminatory reason for Mr. Nazzaro's 3-day suspension and the allegations regarding this suspension should be dismissed.

III. UNILATERAL CHANGE ALLEGATIONS

The Consolidated Amended Complaint alleges Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act by making four (4) alleged unilateral changes: (1) by not laying off using seniority by retaining trainees in April 2016; (2) by attempting to clarify the notification requirements for employees returning from Short-Term Disability leave; (3) by insisting on a joint orientation for new hires; and (4) by adjusting the shift times for the B&R Processors. Each of these allegations is without factual or legal merit and should be dismissed.

A. Factual Background

1. April 2016 Temporary Layoffs.

The only record evidence concerning the layoff allegation came from Mr. Stan Milewski, the Union's Business Agent, and Ms. DiStefano, Respondent's Director of Labor Relations. Mr. Milewski testified that approximately 50 employees were laid off in April 2016 for one week and that eight (8) junior employees were retained. (Tr. p. 82:5-14).[12] He testified that less senior

[12] This testimony is factually inaccurate and exaggerated. The exhibits show that there were only 44 employees laid off for the week, not 50 as Mr. Milewski falsely testified. (*See* GX-15).

employees never remained working during layoffs. (Tr. p. 82:12-18). He also testified that the layoff language in the CBA has never affected trainees (Tr. pp. 105:23-106:2), and that the Union had allowed trainees to remain in classroom orientation previously, as an exception to the seniority language (Tr. p. 106:7-22). He admitted that, other than the trainees, the employees temporarily laid off in April 2016 were the least senior employees. (Tr. pp. 189:22-190:13). While the Union alleges that Respondent violated Article 5 of the CBA with the April 2016 layoffs, Mr. Milewski admitted that the trainees were already hired prior to the layoff. (Tr. pp. 191:25-192:19). The trainees retained during the April 2016 layoff were in their second week of orientation, when the trainees were shadowing and working alongside other more senior employees. (Tr. pp. 193:21-194:23). There were at least two (2) prior situations where trainees were retained while "more senior" employees were laid off. (Tr. p. 197:1-16). Mr. Milewski admitted that training is 5 days in a classroom and then training on the production floor. (Tr. p. 253:7-15).

Ms. DiStefano testified that, in 2014, the Union had filed a grievance (RX-2) involving the retention of trainees in orientation during a layoff. (Tr. p. 1187:8-15). In that case, the Union failed to pursue the matter past the third step of the grievance procedure. (Tr. p. 1188:7-13). Ms. DiStefano explained that the second week of training is still training, as they observe work on the floor to understand what the positions entail. It is not work that anyone who is not in training can do. (Tr. p. 1220:7-15).

2. Notice of Expected Return to Work From Short Term Disability Leave.

The main record evidence concerning this alleged change also came from Mr. Milewski. He testified that, before March 2016, Respondent had required employees who were returning from Short Term Disability leave ("STD") to provide 24 hours' notice before their next

scheduled shift of their intent to return to work, but this usually just meant that the employee was cleared the day before and then would be placed back on the schedule. (Tr. pp. 54:6-55:10; 55:25- 56:3). Respondent issued a notice (GX-5 (dated March 15, 2016)), which the Union alleges constituted a change to the STD policy. (Tr. pp. 180:15-181:1). Mr. Milewski, however, admitted that employees on STD leave are not on the production schedule and do not have a next scheduled shift. (Tr. p. 184:9-25). Each week, the schedule starts on Monday and schedules are supposed to be posted on Thursday for following week. (Tr. pp. 185:12-186:20). While the language of the first paragraph of GX-4 was changed by the Company (Tr. p. 187:6-17), Mr. Milewski admits that a scheduled shift means a shift actually scheduled for that employee, and that while on STD, the employee does not have a scheduled shift; to have a scheduled shift, you must be on the schedule that is posted on Thursday; and 24 hours before that would be Wednesday. (Tr. p. 188:6-25). After the clarification was issued in March 2016, Mr. Milewski spoke with the Human Resources Manager regarding an employee that was returning from STD and the employee went back to work the next day. (Tr. pp. 449:15-451:12). Other than that incident where the employee was returned to work the next day, Mr. Milewski testified that no other employees were impacted by this alleged change. (Tr. p. 540:8-25). Mr. Gutierrez also testified vaguely about an employee coming back from short term disability in April 2016 (Tr. p. 733:18-21), and the employee came back to work within 48 hours. (Tr. p. 734:14-18).[13] Obviously, the next day is also within 48 hours, so there is no evidence of record that any employee was not allowed to return to work from STD the day after being medically cleared to return to work.

[13] It is unclear as to whether Mr. Milewski and Mr. Gutierrez were talking about the same individual or different individuals. In the end, the testimony was vague and did not establish any change in the policy or practice.

3. Joint Employee Orientation.

Ms. DiStefano testified about the New Employee Joint Orientation language of the CBA. (GX-3 at p. 42). As she explained, there had been various practices over time, some with the Union meeting with new hires separately and some with company management present. (Tr. pp. 1176:6-16; 1177:11-1178:2). Over the prior years, several Human Resources managers had tried to reset the handling of joint orientation with the Union, some with more success than others. (Tr. pp. 1179:20-1180:5). After expiration of the CBA in February 2016, Ms. DiStefano advised the Human Resources Manager at Fair Lawn to discuss with the Union that, going forward, Respondent would follow the letter of the CBA regarding new hire orientation, and that any past practice inconsistent with the CBA did not survive expiration. (Tr. p. 1180:9-24). The Company offered to the Union to do what the CBA says, which is to do joint orientation. Subsequently, this occurred once, with a Company representative sitting in while the Union provided its information to the new hires, but after that Mr. Milewski objected to any Company representative sitting in the joint orientation. (Tr. pp. 1180:25-1181:15).

Mr. Milewski basically testified in a manner consistent with Ms. DiStefano about the orientation issue. He explained that the Union did part of the orientation when it would collect new hire information, applications for union membership, dues checkoff cards, and political action cards, and it would provide the employees a welcome to the Union booklet, the CBA, and the Union's bylaws. (Tr. pp. 64:22-65:1). Mr. Milewski testified that an employee orientation with the Union occurred on May 12, 2016 with a Company representative present – a joint orientation. (Tr. pp. 68:23; 69:6-7). During that orientation, he was able to provide all of the normal information, as well as his business card, to all May orientees. (Tr. pp. 218:23-219:6; 220:14-221:1). Mr. Milewski chose not to participate in employee orientations after the May meeting. (Tr. p. 69:15-18). Mr. Milewski alleges that it was unlawful to change the orientation

process to have a Company representative present during the Union's one hour session. (Tr. p. 215:3-10). He maintains that "jointly" in the CBA means company and union together, but not necessarily at the same time. (Tr. pp. 215:22-216:17).

4. B&R Schedule Changes

Mr. Joe Bevacqua was hired by Respondent, in April 2016, as the Business Unit Leader of the Distribution Center and Warehouse. (Tr. p. 1140:6-12). He was responsible for daily operations of the supervisors and hourly employees. (Tr. p. 1140:13-17). After he started, he noticed that there were staggered start times in the warehouse and that they also varied between jobs. (Tr. pp. 1140:24-1141:2). He met with the salaried staff and Human Resources to determine why the times were staggered, and determined that they did not need to be staggered for business reasons. (Tr. p. 1141:7-13). At that time, the shift start times for the B&R processors in the warehouse were 6:00 a.m., 2:00 p.m., and 10:00 p.m. (Tr. pp. 1141:21-1142:2), but most of the operations had shift start times of 7:30 a.m., 3:30 p.m., and 11:30 p.m. (Tr. p. 1142:3-6). After reviewing with operations, it was determined that 7:00 a.m., 3:00 p.m. and 11:00 p.m. would be the new start times for the B&R Processors. (Tr. p. 1142:7-11). Mr. Bevacqua reviewed the CBA, along with Human Resources and members of the operations (Tr. p. 1142:12-18), and believed that he could change the start times in compliance with Art. 28, Sec. 1 of the CBA (Tr. p. 1143:5-11; 1144:5-15) and Art. 6, Sec. 2. (Tr. pp. 1143:12-1144:4). The shift time change occurred in June or July 2016 (Tr. p. 1145:6-8), and was changed back in November or December 2016 (Tr. pp. 1145:14-22; 1154:9-13), after the ULP Charge was filed by the Union. Mr. Bevacqua did not engage in negotiations with the Union nor did he provide separate notice to the Union prior to making the shift time change (Tr. pp. 1152:24-1153:3) or changing it back (Tr. p. 1154:14-20).

B. Legal Standards

The Board has long taken the position that it will not enter into a dispute "to serve the function of [an] arbitrator" when the employer's "plausible interpretation" of a collective bargaining agreement differs from the charging party. *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

> When "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.

Id. (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965)). Sections 8(a)(1) and 8(a)(5) of the Act are not implicated where the employer acts on "its reasonable interpretation of the parties' contract." *See NRC Corp.*, 271 NLRB at 1213; *see also Westinghouse Elec. Corp.*, 313 NLRB 452, 452 (1993) (dismissing an 8(a)(5) allegation "[w]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or intent to undermine the union" (quoting *Atwood & Merrill Co.*, 289 NLRB 794, 795 (1988))).

As in *NCR Corp.*, just because the Union disagrees with Respondent's reasonable interpretation does not create an unfair labor practice under Section 8(a)(1) or 8(a)(5). *See also Atwood & Morrill Co.*, 289 NLRB 794, 795 (finding no 8(a)(5) violation where dispute is solely one of contract interpretation, and declining to determine "which of two equally plausible contract interpretations is correct"); *Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ's determination that "as long as Respondents have a 'sound arguable basis' for its interpretation of the contract, no violation will be found"). Simply stated, the Act is not implicated by this dispute, as Respondent's actions were always in line with its reasonable interpretation of the CBA and/or past practice.

Even if the General Counsel could establish that there has been such a unilateral change, which it has not, "not all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices." *Crittenton Hosp.*, 342 NLRB 686, 686 (2004). "The imposed change must be a 'material, substantial, and significant one.'" *Id.* (citing *Fresno Bee*, 339 NLRB 1214, 1216 (2003) (citing *Peerless Food Prod.s*, 236 NLRB 161 (1978))). "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Id.* (quoting *S. Cal. Edison Co.*, 284 NLRB 1205 fn. 1 (1987), *enf'd mem.* 852 F.2d 572 (9th Cir. 1988)).

C. Argument

1. Respondent Complied with the CBA's Layoff Seniority Requirements in Conjunction with Its April 2016 Temporary Layoffs.

The General Counsel's claim that Respondent violated Sections 8(a)(1) and (5) by laying off employees on or about April 15, 2016 without following seniority is without merit. For the week of April 11, 2016, Respondent temporarily laid off 44 employees. (GX-15). For these 44 employees, Respondent complied with the layoff and seniority provisions of the CBA. Prior to the layoff, Respondent had hired eight (8) employees. (GX-10). These employees were still within the first 30 days of their employment, and thus were not represented by the Union. The CBA states, in Article 5, Section 1, "No new employee subject to this Agreement shall be *hired* until all employees who have been laid off have returned to work or have been given the opportunity to do so." (Emphasis added). However, the employees in question had already been hired before it became necessary to temporarily lay off the affected employees. During the period of the layoff, and before, these employees were already hired, were in training, and were not conducting regular work. (GX-10). Laying off these new hires would still have required laying off the other employees, and therefore would not have accomplished anything except to

delay the new hires' training. The manner in which the Company treated the new hire trainees is consistent with the CBA. As a result, Respondent's handling of the temporary layoff complied with the CBA.

Moreover, the testimony of both the Union's witness, Mr. Milewski (Tr. p. 106:7-22), and the Respondent's witness, Ms. DiStefano (Tr. pp. Tr. p. 1187:8-1188:13), establish that retaining trainees during temporary layoffs was in accordance with the past practice between the parties and was not a unilateral change. Indeed, Respondent had followed the same practice at least twice within the two or three years preceding the challenged layoff. Consequently, the General Counsel did not establish any violation of Sections 8(a)(1) and 8(a)(5) with respect to the retention of the trainees during the temporary layoff in April 2016, and thus the claim that Respondent unilaterally changed or violated the CBA has no merit and should be dismissed.

2. Respondent's Requiring Employees to Provide Previously Required Reasonable Notice of Expected Return to Work From Short Term Disability Leave Does not Violate Sections 8(a)(1) and (5).

The General Counsel's claim that Respondent violated Sections 8(a)(1) and (5) by unilaterally changing its alleged "old" policy of allowing employees to return to work the next day with a medical note to "now" requiring four (4) days' notice with a medical note is without merit. There was no real change to any policy or practice. The policy had always required 24 hours' notice before the next scheduled shift. GX-4. This language, however, did not make sense with respect to employees on STD, as they were no longer on the schedule and would not have a next scheduled shift. As a result, the "new" language in GX 5 & 6 is not a "material, substantial, and significant" change. *See Crittenton Hosp.*, 342 NLRB 686, 686 (2004). This language just tried to make sense of the prior language, as the employees who are not on the schedule need to be put on the schedule and the schedules are posted on Thursday, so requiring

the notification by Wednesday would be a logical reading of the purpose and intent of the prior language.

More significantly, however, the testimony at the hearing showed that this language "change" did not change the practice for how employees were allowed to return from STD leaves. As the testimony showed, Respondent still allowed employees to return to work the next day. This certainly makes sense again, given the shortage of employees and high overtime at the facility. Thus, the General Counsel's claim that Respondent unlawfully changed its medical clearance policy for return to work from STD has no merit and should be dismissed.

3. Respondent Has Complied with the CBA's Joint Employee Orientation Requirements After Expiration of the CBA.

The General Counsel's next claim is that Respondent violated Sections 8(a)(1) and (5) by unilaterally implementing a new policy to comply with the CBA's language that there would be a "joint" new employee orientation with both the Union and Company representatives present. While the Union (and apparently the General Counsel) believes that "joint" means together but separate (Tr. pp. 215:22-216:17), Respondent respectfully maintains that its interpretation of "joint" to mean at the same time is *at least* equally plausible. Therefore, the return to the contract language to provide the Union with the opportunity to conduct a "joint" orientation about union matters on Company time cannot be an unfair labor practice. *See Atwood & Morrill Co.*, 289 NLRB 794, 795 (finding no 8(a)(5) violation where dispute is solely one of contract interpretation, and declining to determine "which of two equally plausible contract interpretations is correct"); *Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ's determination that "as long as Respondents have a 'sound arguable basis' for its interpretation of the contract, no violation will be found").

Moreover, this "change" to comply with the language of the CBA was not a "material, substantial, and significant" change so as to constitute an unfair labor practice. *See Crittenton Hosp.*, 342 NLRB 686, 686 (2004). As Mr. Milewski testified, he was able to provide all of the same information and make the same requests at the "joint" orientation in May 2016 as he had previously, and it was the Union's decision to stop doing the joint orientations. As a result, this allegation is without merit and should be dismissed.

4. Respondent Did Not Unlawfully Change Shift Start Times for B&R Processors.

The General Counsel's next claim is that Respondent violated Sections 8(a)(1) and (5) by unilaterally changing the shift start times for the B&R Processors in the warehouse by 30 minutes to more closely align with the shift starting times for other departments, and then changing the shift start times back after the Union filed an unfair labor practice charge over the change. Again, the Company's exercising one of its rights under the CBA is not an unfair labor practice. According to Article 6, Section 2 of the CBA, shift times are to be "as uniform as possible, consistent with the operation of the bakery." Similarly, Article 28, Section 1 of CBA provides that the Company maintains the right to schedule its employees. (Tr. p. 1143:5-11; 1144:5-15). While the Union (and apparently the General Counsel) believes that trying to make the start times as uniform as possible means that they cannot ever be changed, Respondent respectfully maintains that its interpretation of this language to allow the changes of the schedule to be as uniform as possible consistent with the operation of the bakery is *at least* equally plausible. Therefore, making the small adjustment to the schedule of the B&R processors to be more uniform with other employees, consistent with the operation of the bakery, cannot be an unfair labor practice. *See Atwood & Morrill Co.*, 289 NLRB 794, 795 (finding no 8(a)(5) violation where dispute is solely one of contract interpretation, and declining to determine

"which of two equally plausible contract interpretations is correct"); *Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ's determination that "as long as Respondents have a 'sound arguable basis' for its interpretation of the contract, no violation will be found"). Moreover, changing back to the prior schedule, following the Union's protest, is not a separate unfair labor practice. There is no evidence that either schedule adjustment was done to undermine the Union or for any reason other than the Company's reasonable interpretation of its contractual right to set schedules and to attempt to ameliorate the Union after its protesting of the initial change. As a result, this allegation should also be dismissed.

IV. REQUESTS FOR INFORMATION ALLEGATIONS

The Consolidated Amended Complaint alleges that Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act by failing to respond to, or unreasonably delaying in its response to, the Union's requests for information concerning new hires and clock in/clock out discipline. This allegation is also without factual or legal merit and should be dismissed.

A. Factual Background

The Union made a request for information ("RFI") on May 13, 2016 for all disciplines for clock in/out violations for a **TEN** (10) year period. (GX-13; Tr. p. 221:6-10). The Union allegedly sought this information in reference to GX-12, a grievance referenced in the RFI that alleges a unilateral change to the clock in/out policy. (Tr. pp. 222:20-223:7). Prior to May 13, 2016, however, the Union had also filed an ULP charge for the same alleged change to Respondent's clock in/out policy. (Tr. pp. 223:8-224:3; GX-1(a)) (April 15, 2016 ULP Charge).

Despite the pendency of the ULP and the fact that the CBA had expired and there could not be any arbitration of the Union's grievance, the Company fully responded to this RFI by way of CX-1 (response to clock in/out RFI), which was received by the Union on September 9, 2016.

(Tr. p. 224:5-14). The Union never alleged that this response was in any way deficient. (Tr. pp. 224:23-225:1).

The Union made a separate RFI for new hire information (GX-9) on July 7, 2016. (Tr. p. 225:2-14). The Union was requesting new hire information for union dues purposes. (Tr. p. 227:9-14). The Union had already filed an ULP over the union dues issue on June 14, 2016. (GX-1(c)). While Mr. Milewski testified that the Company did not respond to this RFI (Tr. p. 228:8-18), that is incorrect. Mr. Milewski received RX-4 (with the employee information) to his union email address on May 24, 2016 with a list of all hires from January 1, 2014 to March 1, 2016, their addresses were provided on April 12, 2016 (Tr. pp. 232:23-233:11), and employees hired though June and July 2016 were produced on September 2, 2016 (Tr. p. 234:11-25) -- so, the Union had received all information in response to the RFI by September 2, 2016 (Tr. p. 235:19-24). For good measure, Respondent provided the same information to the Union in January 2017. (RX-3)).

B. Legal Standards

It is not an unfair labor practice to fail to respond to Union requests for information that are in reality discovery devices attempting to pursue discovery in support of unfair labor practice charges. *See WXON-TV*, 289 NLRB 615, 617-618 (the Board dismisses information allegation, since Union filed ULP charge and information request on same day. Board concludes that information request was akin to a discovery device pursuant to pursuit of unfair labor practice charge rather than to duties as collective bargaining representative.). An employer's refusal or failure to provide information is proper when the timing of the request makes it clear that the information is intended to assist the union and the General Counsel in presenting evidence in support of the unfair labor practice complaint. *Sahara Las Vegas*, 284 NLRB 337 (1987); *see, Unbelievable, Inc, d/b/a Frontier Hotel &Casino*, 318 NLRB 857 (1995).

It is also not an unfair labor practice to fail to provide information to the Union that already has been provided. *United Parcel Service of America, Inc.* 362 N.L.R.B. slip op. 22 (Feb. 26, 2015) (employer should not be found to have failed to provide information that it had provided in response to earlier requests).

C. Argument

The General Counsel's claim that Respondent has violated Sections 8(a)(1) and 8(a)(5) by refusing to respond to requests for information is without merit. The RFIs were improper attempts to obtain discovery in support of the Union's pending ULPs. (GX-1(a); GX-1(c)). Each RFI clearly post-dated the ULPs on the same issue and were not proper RFIs, and thus Respondent was within its rights to simply refuse to provide the requested information. *See WXON-TV*, 289 NLRB 615, 617-618 (the Board dismisses information allegation, since Union filed ULP charge and information request on same day. Board concludes that information request was akin to a discovery device pursuant to pursuit of unfair labor practice charge rather than to duties as collective bargaining representative.)

Respondent, however, agreed to provide the information and did, in fact, provide the Union with all of the requested information in a timeframe that was reasonable in light of the overly broad nature of the requests. Consequently, the General Counsel's allegation that Respondent has unlawfully refused or failed to respond to the Union's requests for information has no merit and should be dismissed.

V. DUES CHECK-OFF ALLEGATION

The Consolidated Amended Complaint alleges Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act by failing to check off and pay union dues for new hires after the expiration of the CBA in February 2016. This allegation is also without factual or legal merit and should be dismissed.

A. Factual Background

Mr. Milewski testified that the Union has received all dues for the May 2016-oriented employees at issue, except a "couple." (Tr. pp. 237:12-15; 242:3-18). He further admitted that there have been prior occasions that the Union has not received dues as a result of "a lot of clerical errors on [the Company's] behalf." (Tr. p. 238:20-21). He admitted that, given the administrative issues with collecting dues for 500 employees, "you have mistakes." (Tr. p. 240:15-19). Mr. Milewski also admitted that one of the allegedly outstanding employees paid dues directly (Tr. p. 247:3-6), and that the Company cannot deduct dues from employees that have resigned or otherwise left the Company, which would likely account for the other potentially missing employees. (Tr. p. 247:20-25). With respect to all other employees hired before or after the expiration of the CBA, the Company has withheld from its employees and paid to the Union substantially all union dues.

B. Legal Standards

Respondent believes that the appropriate legal standard is the same as set forth in the Unilateral Change section – Section III, B.

C. Argument

The General Counsel's claim that Respondent violated Sections 8(a)(1) and (5) by unilaterally refusing to deduct union dues for new employees after expiration of the CBA is without merit. The allegation is simply not true. Respondent has continued to deduct dues for existing employees who signed dues deduction authorizations, unless the employee has properly revoked his or her dues deduction authorization. *See Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). Further, for new employees hired after the CBA's expiration, Respondent has complied with the dues check off requirements of Article 3, provided the new employee has signed a dues deduction authorization. The General Counsel did not prove any intentional

withholding of union dues with respect to newly hired employees. Indeed, the General Counsel did not establish that the Company had failed to check off and pay the Union dues for any particular employee, let alone that it did so in order to weaken the Union. Thus, General Counsel's claim that Respondent has unlawfully eliminated the dues check off under the expired CBA has no merit and should be dismissed.

Moreover, to the extent that the General Counsel is pursuing this allegation, Respondent maintains that it had no legal obligation to continue to check off dues following the expiration of the CBA in February 2016, as it maintains that *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), was wrongly decided for the reasons stated by the dissent in that decision. Specifically, in that 3-2 decision, the Board improperly overturned over 50 years of precedential history under *Bethlehem Steel, Co.*, 136 NLRB 1500 (1962), in holding that employers could not unilaterally end dues checkoff at the expiration or termination of a collective bargaining agreement. As Members Miscimarra and Johnson stated in their dissent, the majority's assertions that the new rule is necessary to protect the bargaining process is legally incorrect and bad policy. While Respondent understands that the ALJ is bound to follow current Board law, Respondent believes that the current Board should overrule *Lincoln Lutheran* and return to the long-standing Board precedent that stated that dues check off provisions do not survive expiration of the collective bargaining agreement. First, dues check off is a form of union security, which becomes revocable regardless of its terms if the employees vote to deauthorize the union. Second, the majority's comparison of dues check off to other voluntary check off agreements, such as an employee's savings accounts and charitable contributions, is a misinterpretation of the Act and should therefore not be afforded the same treatment. Third, employees are provided with several other options to pay union dues as opposed to dues check off, therefore the majority "overstates

the consequence of discontinuing dues check off." With the changing patterns of industrial life, most employees have ready access to checking accounts and direct debit arrangements that could "direct the automatic payment of dues." Finally, the decision to overrule *Bethlehem Steel* "modifies one of the established substantive aspects of the bargaining process to an extent Congress has not countenanced," and such changes have a severe effect on the bargaining process as it improperly limits the employer's bargaining leverage. Indeed, the current stand-off between the Union and Respondent and the uncertainty and difficulties for the employees presented in this case may not exist if the Company had been free to cease dues check-off at the expiration of the CBA, as it would have been free to do under the *Bethlehem Steel* standard.

As predicted by the dissenters, the new rule has "adversely affect[ed the] current bargaining process that . . . have promoted labor relations stability." The loss of bargaining leverage that resulted from the cessation of dues check off at the expiration of the collective bargaining agreement is at least in part to blame for the fact that a new CBA has not yet been reached between the parties. Over two years later, the Union continues to collect dues despite the expiration of the CBA and the myriad changes that brings, such as the expiration of the requirement to arbitrate the disputes at issue in this case. The General Counsel and the Union are trying to force the ALJ to improperly act as an arbitrator to resolve these various disputes over the proper interpretation of the CBA and alleged past practices.

VI. REMEDY ISSUES

While it is unclear from the record what specific remedies the General Counsel and Union seek, the rhetoric employed by the Union in particular gives rise to concerns that some extraordinary remedy may be sought. However, in these cases, no such remedy would be justified or appropriate.

The General Counsel bears the burden to demonstrate circumstances justifying an award of extraordinary relief. *Fla. Steel Corp. v. NLRB*, 713 F.2d 823, 831 (D.C. Cir. 1983) (rejecting extraordinary remedies, including a reading of the notice to employees, because such remedies "can only be explained as containing punitive measures designed to defer future violations of the Act."); *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 639 (D.C. Cir. 1981) (refusing to impose extraordinary remedies because the Board failed to make a "clear showing . . . that access is needed to reassure employees of the existence and vitality of protected legal rights.").[14] The General Counsel simply cannot meet that burden here with respect to any of these matters.

Any extraordinary remedies sought should not be awarded unless the General Counsel establishes that an employer has a proclivity to violate the Act, or has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979); *see also NLRB v. Blake Constr. Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981). The Board "reserves extraordinary remedies for cases involving unfair labor practices that are 'so numerous, pervasive, and outrageous' that 'special' remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics*, 400 F.3d at 935 (finding that the General Counsel failed

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[14] *See also NLRB v. Trailways, Inc.*, 729 F.2d 1013 (5th Cir. 1984) (refusing to impose remedial sanctions of notice distribution and union access because they were not necessary to achieve full remedial relief); *NLRB v. Southwire Co.*, 801 F.2d 1252 (11th Cir. 1986) (rejecting remedies affording union special access, such as access to employer's bulletin boards and non-work areas for two-year period even though employer violated prior court orders prohibiting certain violations of the Act.); *Hutzler Bros. Co. v. NLRB*, 630 F.2d 1012 (4th Cir. 1980) (concluding that the Board was not entitled to enforcement of its order requiring employer to permit nonemployee union organizers to have access to store premises for organizational purposes because, *inter alia,* the General Counsel had not sustained its burden of proving that union had no other reasonable means of communicating with employees.); *Food Store Emps. Union, Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973) (holding that the Board properly refused to grant union access to company property and rejected request to have notice read by company officers to the employees.); *Reno Hilton*, 319 NLRB No. 140 (1995) (refusing to issue extraordinary remedies of notice reading and bulletin board access even though the employer committed numerous violations); *Batavia Nursing Inn*, 275 NLRB No. 125 (1985) (concluding that prevailing union not entitled to access to premises or reading of notice to employees); *Dee Knitting Mills, Inc.*, 214 NLRB No. 138 (1974) (refusing to order employer to permit access to company bulletin board, company parking lots or to have president read NLRB notice to employees because there was "nothing so unusual or egregious in this case as to require the extraordinary remedies sought.")

to justify the need for extraordinary remedies). Extraordinary remedies may also be justified if a violation "has produced coercive effects chilling the free exercise of employee rights." *United Steelworkers of Am.*, 646 F.2d at 638. None of these circumstances are present in this case. The allegations are not egregious or outrageous in any way. Consequently, any request for extraordinary remedies should be denied.

VII. CONCLUSION

The General Counsel has failed to adduce evidence sufficient to prove any of the allegations in the Consolidated Amended Complaint. In each matter, Respondent's conduct comported with established precedent, and in no way violated employees' rights as afforded by the Act. As such, the Amended Consolidated Complaint against Respondent should be dismissed in its entirety.

Respectfully submitted,

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Dated: June 14, 2018

Attorneys for Respondent Mondelēz Global LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of June 2018, true and correct copies of the above and foregoing **POST HEARING BRIEF** was electronically filed through the National Labor Relations Board's website, and a copy electronically mailed on the following:

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